

Information Management Journal
ON THE EDGE: The Use & Misuse of Information
“Playing with Electronic Fire”
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Those companies that do not implement an effective electronic information policy or properly manage their electronic records are risking everything

Just how important is it for companies to properly manage corporate electronic information? Ask Prudential Equity Group, a subsidiary of insurance giant Prudential Financial Inc., that recently got burned by a \$600 million settlement after regulators found it guilty - with corporate e-mail providing the proverbial nail in the coffin - of improper mutual fund trading.

Prudential is by no means an anomaly, however. Firms such as Merck, Merrill Lynch, and Morgan Stanley have also recently been singed by mismanaged e-mail and have suffered significant legal and public relations ramifications as a result.

They certainly will not be the last. Countless studies have reported that e-mail is being used more frequently - and, in many cases, exclusively - by companies to relay critical business decisions. But some of the same studies have also revealed that firms just aren't taking seriously the proper management of their electronic information and, as a result, are woefully unprepared to meet litigation, audit, or compliance requirements.

Survey Says ...

To wit, a June 2006 AIIM survey co-sponsored by Xerox Global Services revealed that 63 percent of the 741 companies polled had not analyzed the risk they face from mismanaging electronic information. Forty-three percent said their firm did not have a clear approach for meeting compliance requirements. Worse, only 34 percent said that their organizations have widespread understanding of what electronic records are and how they should be retained.

Another AIIM survey, "E-mail Management: An Oxymoron?" - which polled more than 1,000 organizations in the United States, Canada, and the United Kingdom between August and September 2006 - found that most companies have a too-casual attitude toward the proper management of e-mail. AIIM also found that most companies surveyed are storing e-mail only for a brief time and leave it up to employees to decide what electronic information to keep and what to delete.

The survey also found that:

* Thirty-five percent of total respondents - 52 percent of small organizations and 25 percent of large firms with more than 10,000 employees - said they have not yet begun to address critical e-mail management issues including archiving, lifecycle management, retention, and disposition.

* Forty-one percent said they have begun to address e-mail management but still have a lot of work ahead of them.

* Only 44 percent of those surveyed said their company has an e-mail strategy or policy.

It is mind-boggling that companies aren't doing a better job of managing their electronic information with the danger of e-discovery requests increasing. According to the survey, 25 percent of respondents said they have faced an e-discovery request at least once in the past year.

While the AIIM survey found that many companies have formal policies governing the acceptable use of e-mail by employees, content of messages, mailbox size, and the company's ownership of the e-mail, the majority said they had no business use policies in place for such activities as discussing human resources issues, exchanging confidential information, or responding to requests from regulators or lawyers.

Most companies neither have formal rules about e-mail content and use nor protect their e-mail assets, the AIIM survey revealed. It found that only 30 percent of respondents have implemented an e-mail encryption policy, despite 60 percent of them saying that they are worried about data theft taking place through e-mail. Just 37 percent said they had an instant messaging policy in place.

E-mail archiving, another critical element of proper e-mail management, also needs more attention, according to AIIM. While nearly 60 percent of respondents said they save e-mail as part of regular backup, 18 percent don't archive e-mail at all. In the age of e-discovery, an e-mail archiving or enterprise content management system can protect a business much more than just backing up e-mail.

Litigation Increasing

With litigation rates rising, it is not prudent for companies to simply stick their heads in the sand and hope that they will not be not sued, audited, or investigated.

The odds of that are not in their favor anyway, according to international law firm Fulbright & Jaworski L.L.P.'s 2006 survey of corporate litigation trends. The survey, which polled 311 in-house law departments in 29 U.S. states, found that 94 percent of respondents' (U.S. counsel) organizations had some kind of legal dispute pending in a U.S. court. Eighty-nine percent said that at least one new lawsuit was filed against their company during the past year. One-third of all companies surveyed, and 40 percent of firms earning \$1 billion or more, anticipate the amount of litigation to increase in 2007.

The survey also found that

* Sixty-three percent of U.S. companies initiated internal investigations requiring outside counsel in 2005-06, and more than 70 percent initiated one or more lawsuits. Only 11 percent of all companies were not sued in the past year.

* Forty-nine percent of U.S. counsel surveyed reported an increase in regulatory inquiries at their companies in the past three years, most frequently by the securities and Exchange Commission and the Occupational Safety & Health Administration.

* Sixty-three percent of U.S. companies said they faced at least one in-house probe requiring outside counsel in the past year. Fifteen percent had to launch three or more such investigations; 26 percent for billion-dollar companies.

And all this litigation costs companies dearly. The average litigation expenditure for the 311 U.S. companies polled by Fulbright & Jaworski was \$12 million - not including the final case settlement or judgment payments. For the average U.S. business, this figure represents more than 70 percent of its total legal spending, according to the survey.

E-discovery Edict

Of course, another concern for unprepared companies is the amendments to the Federal Rules of Civil Procedure (FRCP), which became effective Dec. 1, 2006, and, in general, make all electronic information discoverable. The new rules apply to all companies of all sizes and in all industries.

They require firms to produce electronic records in the event of litigation, as part of the pretrial process. If a firm fails to do so, it is certain to face significant monetary penalties. According to a

report from Byte and Switch.com, many firms face six-figure fines because they either don't know about the new rules or are not prepared to comply with them.

The Fulbright & Jaworski survey indicates that only 15 percent of companies are well-prepared to handle an e-discovery challenge as part of a contested civil matter or regulatory investigation.

This small percentage may be due to the fact that, as studies have shown, many high-level executives and IT departments are unaware of the stakes involved. According to a study released in September 2006 by AXS-One Inc. and the Business Performance Management Forum (BPM Forum), many companies lack the IT infrastructure, policies, and processes required to meet current compliance requirements, and less than half of IT executives consider compliance issues to be "critical." In addition, the study revealed that 40 percent don't understand current regulations well enough to implement effective compliance technologies and policies.

The BPM Forum study, "Compliance-Enabled Enterprise the Future: Building the Compliance-Enabled Enterprise," points out potential problems within corporate policies, including:

*** One-third of the respondents said they have no corporate policy covering e-records management, and nearly 20 percent said they didn't know whether they have a policy.**

*** Only 40 percent of the respondents with policies said their companies effectively enforce the e-records management policies that are currently in place.**

*** More than 36 percent said their companies have absolutely no technologies or policies in place to handle an e-discovery request.**

*** Forty-one percent of respondents said it would take anywhere from several days to a week or more to retrieve specific e-mails.**

However, more than 47 percent of all senior executives did say they are worried that their companies' failure to archive and manage their electronic data effectively is a critical liability for their organizations.

The risks aren't going away and, in fact, are only getting bigger. For example, the Radicati Group recently reported that corporate e-mail traffic per user, per day increased by 33 percent between 2005 and 2006, and the research firm predicts that rapid pace will continue over the next few years.

Now is the time for company executives, IT departments, and even employees to determine what their policies are regarding electronic information retention and management - its use, control, management, storage, and archiving - or, lacking such policies, to put some in place.

Perhaps, with the onset of the FRCP amendments, many companies will begin working harder to ensure the proper management and control of their electronic information. Then again, there are probably more than a few firms that are choosing to live in a house not protected by such fire alarms.

E-Discovery DVD

In light of the new amendments to the Federal Rules of Civil Procedure (FRCP) that became effective Dec. 1, 2006, most companies probably need to learn more about electronic discovery and other business-critical electronic record issues.

Fortunately for them, Iron Mountain Inc., Cohasset Associates, and The Sedona Conference want to help. The organizations are offering a DVD addressing current trial-related e-records and e-discovery issues.

According to a PR Newswire release, the DVD shows a mock pre-trial conference before Judge Shira Scheindlin of the Federal District Court for the Southern District of New York and addresses real-world e-records management issues that will likely be discussed in U.S. courts in accordance with FRCP amendments, which require companies to produce relevant e-records in the event of litigation.

During 2003 and 2004, Judge Scheindlin issued five critical opinions in the groundbreaking e-discovery case of Zubulake v. UBS Warburg.

The DVDs were offered free of charge to every law school library and federal court library in the country. For everyone else, the mock pre-trial conference DVD is available for \$25 at www.merresource.com/dvd.htm.

References

"CEE the Future: Building the Compliance-Enabled Enterprise." BPM Forum. 2006. Available at www.axsone.com/pdf/CEE_report_091206_Final.pdf (accessed 30 November 2006).

"Fulbright & Jaworski Survey Finds U.S. Businesses Face an Average of 305 Lawsuits Worldwide, While Spending 70% of Legal Budgets on Litigation." LowFuel.com. 12 October 2006. Available at <http://lawfuel.com/show-release.asp?ID=9064> (accessed 30 November 2006).

"Groundbreaking Study on State of Compliance Readiness in North America Underscores Gap Between Management Expectations and IT's Ability to Implement Appropriate Technologies and Procedures." **AXS-One** Inc. press release. 13 September 2006. Available at www.axsone.com/pr/print/091306_print.htm (accessed 30 November 2006).

"Iron Mountain to Provide U.S. Law Schools and Federal Court Libraries with DVD of Mock Pre-trial Conference That Focuses on the New Federal Rules of Civil Procedure Regarding Electronic Discovery" PR Newswire. 22 October 2006. Available at www5.sys-con.com/read/288287.htm (accessed 30 November 2006).

Jander, Mary. "E-mail Looms as IT Threat." Byte and Switch.com. 11 October 2006. Available at www.byteandswitch.com/document.asp?doc_id=107202&print=true (accessed 30 November 2006).

_____. "FRCP Tip Sheet." Byte and Switch.com. 6 November 2006. Available at www.byteandswitch.com/document.asp?doc_id=109933&print=true (accessed 30 November 2006).

"Litigation Readiness Lacking When it Comes to Electronic Information." AIIM.com. 7 November 2006. Available at http://aiim.typepad.com/aiim_blog/ (accessed 30 November 2006).

Radicati Group. "E-mail and Collaboration Corporate Survey, 2006-2007." September 2006. Available at www.gii.co.jp/english/rd44619-corp-survey.html (accessed 30 November 2006).

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